

BLANK

PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED

DEC 31 1938

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 339

STATE OF ALABAMA, by and Through Its State Tax Commission, and HENRY S. LONG, JOHN P. KOHN, SR., and W. W. RAMSEY, Members Thereof, and NASHVILLE TRUST COMPANY and TITLE GUARANTEE LOAN & TRUST COMPANY, as Executors of the Estate of Mrs. Grace C. Scales, Deceased,

Appellants.

vs.

WALTER STOKES, JR., as Commissioner of Finance and
Taxation of the State of Tennessee,

Appellee.

BRIEF AND ARGUMENT OF APPELLANTS

A. A. CARMICHAEL,
Attorney General of Alabama,
CHAS. C. TRABUE, JR.,
RAY RUSHTON,
MARION RUSHTON,
WALTER KNABE,
FONTAINE HOWARD,
Attorneys for Appellants.

BLANK

PAGE

SUBJECT INDEX

	Page
Official Report of Opinion delivered in Court below	ii
Grounds on which the Jurisdiction of this Court is invoked (See Statement heretofore filed. Also this brief)	6, 8
Statement of the Case	1
The Facts	1
Pleadings	3
Specification of Assigned Errors	5
Summary of the Argument	6
Argument	8

TABLE OF CASES

Alabama Code of 1923, Sections 10418-21	23
Alabama Revenue Acts, 1935, Art. XII, Ch. 2, pp 434-441	7
Barkley v. Dosser, 15 Lee (Tenn.) 529	15
Beidler v. S. Carolina Tax Comm. 282 U. S. 1, 75 L. Ed. 131	7, 8, 9
Blodgett v. Silberman, 277 U. S. 1, 72 L. Ed. 749	7, 9
Borchard, Declaratory Judgments, pp. 618-21	8
Brown's Estate, In re. 247 N. Y. 10, 8 N. E. (2d) 42	8
Burnet v. Brooks, 288 U. S. 378, at 401, 77 L. Ed. 845	10, 18, 24
Commonwealth of Va. v. Imperial Coal Sales Co., 293 U. S. 15, 79 L. Ed. 171	7
12 C. J. 472	23
65 C. J. 699, Sec. 564, notes 76 and 80	23
Declaratory Judgments Act of Tenn. Code Sections 8835-8847	8
Farmers Loan & Trust Co. v. Minn., 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98, 65 ALR 1000	7, 11
First National Bank v. Maine, 284 U. S. 312, 76 L. Ed. 313, 52 S. Ct. 174, 77 ALR 1401	7, 9, 10, 11
Frick v. Penna., 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 ALR 316	7, 11
Gunn v. Barrow, 17 Ala. 743	15
Helvering v. Marshall, 82 L. Ed. Adv. Op. 575	18
Hassett v. Welch, 82 L. Ed. Adv. Op. 575	18, 19
Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65, 89 ALR 1007	15
Johnson Oil Refining Co. v. Oklahoma ex rel Mitchell, 290 U. S. 158, 78 L. Ed. 238	7

Joint Resolution of Congress of March 3, 1931	18, 19
May v. Heiner, 281 U. S. 238, 74 L. Ed. 826	19
Moorehead v. Tipaldo, 298 U. S. 587, 80 L. Ed. 1347	7
Nashville Trust Co. et al v. Walter Stokes, et al, 173 Tenn., 118 S. W. (2d) 228	5
N. C. & St. L. R. R. Co. v. Wallace, 288 U. S. 249, 77 L. Ed. 730	7, 8
New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174	8, 13
Perry on Trusts, Sec. 1	14
Perry on Trusts, Sec. 97, 7th Ed. p. 119	24
Perry on Trusts, Sec. 330, 7th Ed. p. 571	15
Revenue Act of 1932, Sec. 803 (a)	19
Ryan v. Bibb, 46 Ala. 323	15
Safe Deposit & Trust Co. v. Virginia 280 U. S. 83, 74 L. Ed. 180	8, 22, 24, 25
Senior v. Braden, 295 U. S. 422, 79 L. Ed. 1520	8
Tenn. Code 1932, Sections 1259-60	4, 5, 6
Tenn. Code 1932, Sections 8835-8847	3, 6
Trusts Inter Vivos and The Conflict of Laws, 44 Harvard Law Review, 161	16
United States Constitution, Fourteenth Amendment	4, 5, 6
United States Judicial Code, Sec. 237	5
28 U. S. Code, Sec. 344	5

**The Official Report of Opinion Delivered
in the Court Below**

Nashville Trust Co. et al v. Walter Stokes, Commissioner, et al, 173 Tenn., 118 S. W. (2d) 228. For copy of opinion see Exhibit A, Motion as to Jurisdiction Filed in this Court Sept. 6, 1938.

**Grounds on which the Jurisdiction of
the Court is Invoked.**

Paragraph 1 of Rule 12 has been complied with by filing in this Court on September 6, 1938, a motion for leave to file statement and a statement of jurisdiction. This document is referred to as part of this brief. The Court is also referred to pages 6 and 8 of this brief.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1938

No. 339

STATE OF ALABAMA, by and Through Its State Tax Commission, and HENRY S. LONG, JOHN P. KOHN, SR., and W. W. RAMSEY, Members Thereof, and NASHVILLE TRUST COMPANY and TITLE GUARANTEE LOAN & TRUST COMPANY, as Executors of the Estate of Mrs. Grace C. Scales, Deceased,

Appellants,

vs.

WALTER STOKES, JR., as Commissioner of Finance and Taxation of the State of Tennessee,

Appellee.

BRIEF AND ARGUMENT OF APPELLANTS

STATEMENT OF THE CASE

THE FACTS

The admitted facts (Stipulation as to Facts, Record page 40) are as follows:

Mrs. Grace C. Scales, a married woman, wife of D. C. Scales, was a resident of the State of Tennessee and domiciled therein for many years and until the time of her death in 1936. On the 29th day of December, 1917, the said Mrs. Scales, while a resident of Tennessee, executed jointly with appellant, Title Guarantee Loan & Trust Company, a corporation under the laws of Alabama and having its office and place of business in Birmingham, in said State, an indenture or trust agreement by the terms of which she did grant, sell,

transfer and deliver to said corporation as trustee a large amount of stocks and bonds of which said appellant Title Guarantee Loan & Trust Company already had possession as trustee under the provisions of a will of a brother of Mrs. Scales, under which the same securities became the property of Mrs. Scales on the death of the widow of her brother. Said securities were never taken from the physical possession of said Trust Company at Birmingham, but after the execution of the trust indenture remained in the possession of the said Trust Company. See Exhibit A, Record pages 5-15.

By the terms of paragraphs 3 and 4 of said trust indenture (Record pages 10-13) as amended by subsequent agreement among all the parties interested, on January 11, 1929, (Exhibit B, Record pages 15-17) Mrs. Scales reserved to herself: (1) the net income for life, (2) the right to direct the sale of any or all of the property of the trust and reinvestment of the same but providing that "all property acquired by any reinvestment to be held under the terms and conditions of the trust created by this paragraph," (3) the right to remove the trustee and substitute another, which was never exercised, and (4) the right to dispose of all of the trust property "by her last will and testament" with the provision "and if she make disposition by last will and testament then the trust property is to be handled and disposed of as directed in said will," and provided further that in the event she "makes no disposition of the trust property by her last will and testament" the property was still to be held in trust for the benefit of her husband, son and daughter.

Mrs. Scales in the exercise of her reserved right to "direct" and "make disposition" of all trust property in the custody of the appellant Title Guarantee Loan & Trust Company of Birmingham as Trustee did by her last will and testament dated January 1, 1926, make disposition of said securities in the hands of said Title Guarantee Loan & Trust Company as Trustee by directing that said securities remain in the hands

of said Trustee for the benefit of her husband, son and daughter, but rearranging the portions and estate given to each (Paragraph 3 of the Trust, Record page 12 and Section 2 of will, Record page 22).

Under the terms of her will Mrs. Scales appointed the Nashville Trust Company, a corporation of Nashville, Tennessee, as Executor of all property that she owned in the State of Tennessee at the time of her death and appointed Title Guarantee Loan & Trust Company of Birmingham, Alabama, as Executor of her last will as to all property "which I may own in the State of Alabama and also property which I may have the right to dispose of by last will and testament in said State."

The appellant Nashville Trust Company after the probate of said will in Davidson County, Tennessee, qualified as Executor of said will, and after said will was also probated in Jefferson County, Alabama, appellant Title Guarantee Loan & Trust Company qualified as Executor of said estate in said State of Alabama; and letters testamentary were issued to the Nashville Trust Company by the proper court of Davidson County, Tennessee, and letters testamentary were issued to said Title Guarantee Loan & Trust Company by the proper court of Jefferson County, Alabama, the county in which Birmingham is located.

THE PLEADINGS

The original bill in this cause was filed in the Chancery Court of Davidson County, Tennessee, by both of said executors under Sections 8835-8847, inclusive, of the Tennessee Code of 1932, known as the Tennessee Declaratory Judgments Act, for the purpose of obtaining an adjudication as to whether the State of Alabama or the State of Tennessee is entitled to collect death transfer taxes on that portion of the estate of Mrs. Scales which was in the possession of appellant

Title Guarantee Loan & Trust Company as Trustee at Birmingham, Alabama, at the time of her death. It is admitted that at the time of the creation of the trust, and at the time of the execution of the will neither the State of Alabama nor the State of Tennessee had any form of succession tax.

Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee and Henry S. Long, Chairman, John P. Kohn, Sr. and W. W. Ramsey, Associates, as the State Tax Commission of Alabama, were made parties respondent. Service was had upon Mr. Stokes, who filed an answer asserting the right of Tennessee to collect, under the Tennessee inheritance tax law, Code of Tennessee 1932, Sections 1259-60, a tax upon "all intangible personal property" transferred "by a will", and including specifically the securities held in Alabama. The Alabama Commission, under the authority of the Governor of Alabama and with the approval and active advocacy of the Attorney General of Alabama, filed an answer and a cross bill seeking a decree permitting the collection by Alabama of \$2,202.42 as inheritance tax on the assets held in Alabama. (Record page 29.) All of the parties invoked Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All facts set up in the pleadings were admitted by stipulation between the parties (Record page 40). The Chancellor after finding substantially the facts set out above made the following decree:

"It is accordingly ordered, adjudged and decreed by the court that the State of Alabama may legally impose a death transfer or succession tax on said securities held at the time of Mrs. Scales' death in trust by the Title Guarantee Loan & Trust Company as Trustee, and that only one state may impose death transfer taxes on this portion of said estate.

"It is further ordered, adjudged and decreed that the inheritance tax law of Tennessee, insofar as it attempts to im-

pose a tax upon transfers by a resident of Tennessee of 'all intangible personal property' (Code Section 1259) is unconstitutional and void under the facts of this case as a violation of the due process of law clause of the Fourteenth Amendment to the Federal Constitution." (Record page 43.)

Thereafter the Commissioner of Finance and Taxation of the State of Tennessee appealed to the Supreme Court of Tennessee and obtained a reversal and instructions that a declaration be entered in accordance therewith. The substance of the decree entered by the Supreme Court of Tennessee and here appealed from is as follows: (Record page 55)

"A declaratory decree should be and is entered in this Court declaring taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes, the intangible property disposed of by the last will and testament of Mrs. Grace C. Scales, a deceased resident of Tennessee, for the reasons set out and stated in the written opinion is hereby made a part of this decree."

This appeal is brought to this Court by the joint executors of the estate of Mrs. Scales and the taxing authorities of the State of Alabama, under Section 237 of the Judicial Code of the United States (Section 344 of Title 28 to the United States Code) which provides not only for appeal, but for certiorari if that be the proper remedy.

SPECIFICATION OF ASSIGNED ERRORS

The appellants, while joining in the appeal from the declaratory decree of the Supreme Court of Tennessee, have, because of their separate relations, assigned separate errors. The Trust Companies, as executors, appeal from the decree because it permits Tennessee to tax property located in Alabama. Appellant The Alabama Tax Commission, appeals

because by the decree the Commission is denied the right to tax property located in Alabama.

The language of these assignments of errors is, however, identical. Each appellant specifies and intends to urge each assigned error. The first assignment of error as to each appellant raises the proposition that the Tennessee inheritance tax law as interpreted by the Supreme Court of Tennessee with reference to the facts in this case violates the Fourteenth Amendment because the intangible personal property is situated in Alabama, and Tennessee has no authority to tax property beyond her jurisdiction. The second assignment raises the point that the Supreme Court of Tennessee erred in holding that Alabama had no right to tax the inheritance of any of the securities. The third assignment is limited in its application to the bonds held in Alabama and does not refer to the other securities. The fourth assignment is a general attack upon Sections 1259-60 of the Tennessee Inheritance Tax Law as invalid under the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

I

A controversy within the power of this Court to review is presented by a proceeding under the Uniform Declaratory Judgments Act of Tennessee, wherein the validity of the Inheritance Tax Law of Tennessee is established and that of Alabama is denied, as applied to intangible personal property kept and used in Alabama, the Fourteenth Amendment of the United States Constitution being invoked by all parties.

Chapter 29, Tennessee Public Acts of 1923, now codified as Sections 8835-8847, Code of Tennessee 1932; Code of Tenn. 1932, Sections 1259-60;

Revenue Acts of Ala., Art. XII, Ch. 2, Acts 1935, pages 434-441;
N. C. & St. L. R. R. Co. v. Wallace (1933), 288 U. S. 249, 77 L. Ed. 730;
Blodgett v. Silberman (1928), 277 U. S. 1, 72 L. Ed. 749;
Commonwealth of Va. v. Imperial Coal Sales Co. (1934), 293 U. S. 15, 79 L. Ed. 171;
Morehead v. Tipaldo (1936), 298 U. S. 587, 80 L. Ed. 1347.

II

A state cannot impose a tax upon the transfer on the death of the owner of property having an actual situs in other states although the owner was domiciled within its limits.

Frick v. Penna. (1925), 268 U. S. 473, 69 L. Ed. 1058;
Farmers Loan & Trust Co. v. Minn. (1930), 280 U. S. 204, 74 L. Ed. 371;
First National Bank v. Maine (1932), 284 U. S. 312, 76 L. Ed. 313.

III

Where a federal constitutional right with respect to a state tax turns upon the determination of the situs of the property taxed, it is the province of the Supreme Court to analyze the facts and ascertain whether the conclusion of the State court has adequate support in the evidence.

Johnson Oil Refining Co. v. Oklahoma ex rel Mitchell, (1933), 290 U. S. 158, 78 L. Ed. 238;
Beidler v. S. Carolina Tax Commission (1930), 282 U. S. 1, 75 L. Ed. 131.

IV

Corporate bonds, mortgages, and shares of stock "kept and used" in trust within a state acquire a situs there for taxation purposes analogous to that of tangible personal property.

New Orleans v. Stempel (1899), 175 U. S. 309, 44 L. Ed. 174;
Safe Deposit & Trust Co. v. Virginia (1929), 280 U. S. 83, 74 L. Ed. 180;
Beidler v. S. Carolina Tax Commission (1930), 282 U. S. 1, 75 L. Ed. 131;
Senior v. Braden (1935), 295 U. S. 422, 79 L. Ed. 1520;
In re Brown's Estate (1937), 247 N. Y. 10, 8 N. E. (2d) 42.

ARGUMENT

I: JURISDICTION OF THIS COURT

The jurisdiction of this Court to review proceedings under the Uniform Declaratory Judgments Act of Tennessee has already been determined.

N. C. & St. L. R. R. v. Wallace; 288 U. S. 249, 77 L. Ed. 730.

It is invoked in this instance by the trustees of Mrs. Scales' estate who have an interest not only in maintaining that under the Fourteenth Amendment the securities in Alabama shall not be taxed twice, but are also interested that Alabama, which taxes at a lower rate, shall prevail over Tennessee. The taxing authorities of Alabama are also interested because, since under the Fourteenth Amendment the securities can be taxed but once, they are by the decree of the Tennessee Supreme Court deprived of taxing them at all.

Here is a controversy in which the plan and scheme of the Declaratory Judgments Act is particularly valuable in reducing litigation and establishing a precedent for use in the "very practical matter" of taxation.

Borchard, Declaratory Judgments, pages 618-21.

The right of the executors to appeal invoking the Fourteenth Amendment is unquestionable.

First National Bank v. Maine, 284 U. S. 312, 76 L. Ed. 313.

The right of the Alabama taxing authorities is established by the procedure of this Court in *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749, and the cases heretofore cited.

II: ONLY ONE STATE MAY TAX AN INHERITANCE

The decisions of this Court have now established beyond the necessity of argument the proposition that the transfer of any specific property from the dead to the living is a single event and may be taxed by only one state.

First National Bank v. Maine, 284 U. S. 312, 76 L. Ed. 313.

**III: THIS COURT WILL DETERMINE FACTS AND LAW
FOR ITSELF**

This Court is not bound by the findings either of the Chancery Court of Davidson County or the Supreme Court of Tennessee. It will examine the record for itself, analyze the facts and ascertain what they mean.

Beidler v. S. Carolina Tax Commission, 282 U. S. 1, 75 L. Ed. 131.

**IV: INTANGIBLES "KEPT AND USED" IN TRUST WITHIN A STATE
ARE TAXABLE THERE UPON INHERITANCE**

While it is true that intangible personal property normally takes a situs at the domicile of its owner, it may acquire a situs in another jurisdiction. This question heretofore has been reserved by this Court to such time as it may properly be presented for consideration.

First National Bank v. Maine, 284 U. S. 312, at 331, 76 L. Ed. 313, at 321.

Appellants and appellee are in substantial agreement up to this point, but from this point our contentions divide. The learned counsel for Tennessee contend that the only possible exception to the general maxim of *mobilia sequuntur personam* is where the intangibles become integral parts of some local business in a state other than the domicile,—their contention as we understand it, being, that the local business must be an active business of some sort (never as yet attained by any litigant), and that no special trust, however established in a foreign state, is a part of a "local business."

Our contention is that under its recent decisions this Court will deal with actualities and not ancient fictions. The true rule deducible from the decisions, it seems to us, is that the maxim *mobilia sequuntur personam* has gradually yielded, for intangible as well as tangible personal property, "to the law of the place where the property is kept and used."

First National Bank v. Maine, 284 U. S. 312, at 329, 76 L. Ed. 313 at 320.

In the present case the stocks, bonds and mortgage participations have been kept in Alabama for 33 years and used in the only way in which they can be used, that is, kept safely and when the due dates come around interest and principal promptly collected by the trustee who, in reality, is an agent for that purpose in Alabama. While this court has not yet put out a case "on all-fours" with this case, it has noted a "progressive application" of the principle we here contend for. In *Burnet v. Brooks*, 288 U. S. 378 at 401, 77 L. Ed. 855, this Court said:

"As pointed out in the opinion in the *First Nat. Bank* case, the principle has had a progressive application. In *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 513, 23 S. Ct. 463 the question related to a ferry franchise granted by Indiana to a Kentucky corporation which Kentucky attempted to tax. Despite the fact that the tax was laid upon

a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. *Id.* p. 398. In *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. By *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A. L. R. 316, the rule became definitely fixed that as to tangible personal property the power to impose a death transfer tax was solely in the State where the property had an actual situs, and could not be exercised by another State where the decedent was domiciled. See *First Nat. Bank v. Maine*, *supra* (284 U. S. p. 322, 76 L. Ed. 316, 52 S. Ct. 174, 77 A. L. R. 1401). The decision in *Farmers Loan & T. Co. v. Minnesota*, 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98, 65 A. L. R. 1000, *supra*, overruling *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277, carried forward the principle by applying it to intangibles. The Court was of the opinion that "the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment." 280 U. S. pp. 211, 212, 74 L. Ed. 374, 375, 50 S. Ct. 98, 65 A. L. R. 1000."

In analyzing the facts we wish to draw at the outset a distinction between those which indicate an intention to keep and use the property within the State of Alabama and those

which are merely incidents of the manner in which the beneficial rights are to be exercised and enjoyed. We attach more significance to the keeping and using of the securities in Alabama, the impossibility of removing them or their re-invested replacements from Alabama, than to what was to become of the income from the securities and whether encroachment, reinvestment or the right to remove the trustee or to dispose of the trust property by will were reserved to the settlor. We think this distinction is important because of the analogy which has developed in the keeping and using of tangible personal property. It has long been settled, for example, that where freight cars are sent into another state than that of the domicile of the owner they are taxable in that other state even though they are constantly subject to the order of the owner to be returned and are in fact frequently brought back into the state of domicile. The owner of such freight cars derives the revenue from their use in other states. He can repair and replace them. He can dispose of them by will, and yet so long as he keeps and uses a certain proportion of them in foreign states they are taxable alone in that foreign state.

It is perfectly apparent from the undisputed facts in this case that the family of which Mrs. Scales was a member had from 1905 kept these securities in trust in the hands of the same trustee in Alabama, and it also appears that Mrs. Scales left them there by her last will and testament. The Supreme Court of Tennessee in the opinion supporting the judgment here appealed from, lays great stress upon the right reserved by Mrs. Scales to dispose of all the trust property by will, and states that "when she died leaving a will disposing of the trust property, the situation was the same as though there had never been a trust." (Record page 52.) Whether or not the trust was completed by the will, the fact remains that the securities were still kept and used and, even under the will, are now kept and used in Alabama.

When the duties of the Trustee in the present case are analyzed they bear a striking resemblance to the duties of the agent in *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174. There the guardian and her minor wards were citizens of the State of New York and the property which the infants owned consisted of "money in possession, on deposit or on hand, money loaned on interest, all credits and bills receivable" in the hands of an agent in Louisiana.

Mr. Justice Brewer, in delivering the opinion of the Court, said:

"The important question was whether the property was subject to taxation. * * * Under the circumstances disclosed by the testimony, were the money and credits subject to taxation? It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans in possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. * * * They are property arising from business done in the state. They were tangible property when received by the agent of the plaintiffs and, as such, subject to taxation, and their taxability was not, as the court holds, lost by their mere deposit in a bank. * * * yet as evidently the moneys were to be kept in the state for reinvestment or other use they remained still subject to taxation. * * * With regard to the notes and mortgages, it may be conceded that there is no express decision of the Supreme Court to the effect that they were taxable under the law of 1890, yet the reasoning of that court in several cases and its declarations, although perhaps only *dicta*, show that clearly in its judgment they had a local situs within the state and were by the statute of 1890 subject to taxation. * * * It is well settled that bank bills and municipal bonds are in

such a concrete tangible form that they are subject to taxation wherever found, irrespective of the domicile of the owner. * * * Notes and mortgages are of the same nature and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."

The word "trust" in its principal and broader sense embraces a multitude of relations, duties and responsibilities. One definition of a trustee is "a person in whom some estate, interest or power in or affecting a property of any description is vested for the benefit of another." This definition embraces all trusts.

Perry, On Trusts, Section 1.

The trust indenture between Mrs. Scales and the Trust Company at Birmingham created a trust *inter vivos* as distinguished from a testamentary trust. Notwithstanding the fact that she reserved the income from her property so long as she lived, the trust took effect immediately upon its execution and the delivery of the securities to the trustee and so long as she lived it was as to the corpus of the estate irrevocable. It was in no sense a mere temporary deposit of the securities in Alabama. It could not possibly terminate so long as she lived and even at her death it could not terminate unless she by her will directed otherwise.

The contention of appellee is that notwithstanding the trust instrument and the actual location of the securities in Alabama, and notwithstanding the legal title to the securities was vested in the Trust Company, whose place of business was at Birmingham, Alabama, the custody and control of the securities still remained with Mrs. Scales and remained attached to her person all of the remainder of her life and were so attached to her person at the time of her death;

that the State of Tennessee had jurisdiction over the securities at the time of her death and can now levy what is called in Tennessee an inheritance tax on all of the property embraced within the Alabama trust, even including the \$200,000 of Pratt Consolidated Coal Company bonds, listed in Exhibit B (Record page 15). That contention has nothing whatever to stand on except the fiction, *mobilia sequuntur personam*.

It is the fundamental law of trusts that "the trustee is entitled to the possession of all personal securities such as bonds, notes, mortgages and certificates of stock belonging to the trust estate and he may maintain an action for their delivery even against the *cestui que trust*. All personal actions for injury to the personal property, or its detention or conversion, such as trespass, trover, detinue or replevin must be brought in the name of the trustee, although the possession is in the *cestui que trust* and although there may be a defect in the title of the trustee; for the possession of the *cestui que trust* is the possession of the trustee and in law he is not allowed to dispute the title or possession of his trustee."

Perry on Trusts, Section 330, 7th Edition, page 571.

The above is the law of trusts everywhere; so far as we have found. It seems to be the law of Tennessee (*Barkley v. Dosser*, 15 Lee 529) and the law of Alabama (*Gunn v. Barrow*, 17 Ala. 743; *Ryan v. Bibb*, 46 Ala. 323).

A recent quite interesting case is that of *Hutchison v. Ross*, 262 N. Y. 381, 187 N. E. 65, 89 A. L. R. 1007. The amount involved was large, counsel on both sides included some of the most distinguished lawyers of the United States. The opinion was written by Justice Lehman. The case was not a tax case and what is said in the opinion about taxes is obiter dicta, but the opinion and the annotation in 89 A. L. R., beginning on page 1023, are interesting reading to anyone who has the time and leisure. The interesting part of Judge Lehman's

opinion will be found on page 1016 of 89 A. L. R. and reads as follows:

"The paucity of old judicial decisions upon conveyances in trust *inter vivos*, compared with the number of decisions upon testamentary trusts, shows that conveyances in trust *inter vivos* were comparatively rare. Thus the possible importance of drawing distinctions between the rules applicable to testamentary trusts and trusts *inter vivos* was not apparent or brought to the attention of the courts. Moreover, the maxim '*mobilia sequuntur personam*' was more rigidly and uniformly applied in earlier days. The conflict between fact and maxim then seemed less important. Today the courts cannot close their eyes to the fact that trusts of personal property and securities are created by settlors during their lifetime for many purposes, and for the first time our court is called upon to decide directly the question whether conveyances in trust of securities made *inter vivos* shall be governed by the same rules as testamentary trusts or by the same rules as other conveyances *inter vivos*."

Attention is called by Justice Lehman to the article by Professor Cavers ("Trusts *Inter Vivos* and the Conflict of Laws," 44 Harvard Law Review, 161) and the opinion proceeds as follows:

"In *Sullivan v. Babcock*, 63 How. Pr. 120, the court, at Special Term, sustained a conveyance in trust of personal property in the State of New York on the ground that such conveyance was valid in New Jersey where the settlor resided and where the trust indenture was executed. The case was not appealed to this court and is significant mainly because the court apparently relied, as authority for the rule applied, exclusively on Story on Conflict of Laws, which asserts broadly that the laws of the owner's domicile should in all cases de-

termine the validity of *every* transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or *post mortem*.' Section 383. (Italics are ours.) In *Townsend v. Allen*, 59 Hun. 622, 13 N. Y. S. 73, affirmed, without opinion, 126 N. Y. 646, 27 N. E. 853, the court at General Term again assumed that this was the law, but there the decision was that the conveyance in trust was valid under the New York rules as well as under the rules of the settlor's domicile. That was true also in *Maynard v. Farmers' Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. S. 83, and this court in affirming the judgment, 238 N. Y. 592, 144 N. E. 905, expressly indicated that affirmance was not based on the reasons given in the Appellate Division."

Further on the opinion says:

"In all the affairs of life there has been a vast increase of mobility. Residence is growing less and less the focal point of existence, and its practical effect is steadily diminishing. Men living in one jurisdiction often conduct their affairs in other jurisdictions, and keep their securities there. Trusts are created in business and financial centers by settlors residing elsewhere. A settlor, regardless of residence, cannot establish a trust to be administered here which offends our public policy. If we hold that a nonresident settlor may also not establish a trust of personal property here which offends the public policy of his domicile, we shackle both the nonresident settlor and the resident trustee."

Further on in the opinion Justice Lehman says:

"In regard to other conveyances or alienations of personal property situated here, they have steadfastly applied the law of the jurisdiction where the personal property is situated. The maxim that movable personal property follows its owner is restricted to the field

within which the state where that property is found chooses to apply other laws than its own, and modern conditions have caused a limitation of that field to narrow bounds. That is true in other jurisdictions as well as here. Where a nonresident settlor establishes here a trust of personal property intending that the trust should be governed by the law of this jurisdiction, there is little reason why the courts should defeat his intention by applying the law of another jurisdiction. Cf. Dicey on Conflict of Laws (4th Ed.) pp. 591 and 713."

Likewise the opinion of the United States Supreme Court in *Burnet v. Brooks*, 288 U. S. 378-406, 77 L. Ed. 845, is interesting as throwing light on old maxims giving way to modern conditions.

The many opinions of the Supreme Court of the United States on the question of including in a decedent's estate tax "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated," throws some light upon the question in this case. Prior to the Joint Resolution of Congress of March 3, 1931, trusts reserving a life estate to the trustor were recognized by the Supreme Court of the United States as being valid, and it was said in the rather recent case of *Hassett v. Welch* and *Helvering v. Marshall*, Volume 82 L. Ed. Advance Opinions, 575 at page 578:

"Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition this court held otherwise. (Citing *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826.) Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed. (*Burnett v. Northern Trust Co.*, 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnett*, 283 U. S. 783, 75 L. Ed. 1412; *McCormick v. Burnett*, 283 U. S. 784, 75 L. Ed. 1413.)

In the case of *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, the United States Supreme Court said, on page 243 of the opinion:

"The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed *passed from her to the living*; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed *immediately prior to her death* was obliterated by *that event*." (Italics supplied.)

The court further said, on page 244 of the opinion:

"One may freely give his property to another by absolute gift (there was no gift tax at that time) without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with the remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

It will be remembered that but for the Joint Resolution of Congress of March 3, 1931, and Section 803(a) of the Revenue Act of June 6, 1932, adding to clause (c) of Section 302 of the Revenue Act of 1926 the language, "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of the income from the property or (2) the right to designate the person who shall possess or enjoy the property or the income therefrom," the United States Government could not now, under the ruling in *May v. Heiner*, levy

an estate tax on that part of the Scales estate involved in this trust.

There never has been anything in the law, so far as we have been able to discover, that prohibits a trustor from making a good and valid trust and reserving the income from the property to himself for life. It is simply a separation of the corpus from the income, which is perfectly legitimate. It is the corpus of the trust estate that we are here dealing with and the mere fact that Mrs. Scales reserved the income to herself for life in no way affects the situs of the property sought to be taxed. Nor would it seem from the holding in *Hassett v. Welch* that her reserved right to designate the persons who shall possess or enjoy the property or the income therefrom by will would in any way affect the trust. The property belonging to a trust estate is not necessarily taxable as a whole. Part of it may be taxable in one state and part in another. Under Mrs. Scales' Alabama trust, the corpus of the property was located in Alabama and taxable in Alabama. The income therefrom reserved to herself was purely personal, not taxable by the State of Alabama but by the state of her domicile, which was the State of Tennessee. At her death her income from the property ceased, but the corpus of the estate was under the jurisdiction of Alabama and located within the territorial limits of Alabama.

It seems very plain that if Mrs. Scales had put all of her property into the Alabama trust and at the time of her death had owned no property whatever in the State of Tennessee, that the State of Tennessee would have been absolutely without any jurisdiction to impose a succession tax or inheritance tax on her estate. So long as she lived, it could frame personal taxes, poll taxes, income taxes, and so on, and enforce them by reason of the fact that it had jurisdiction of her person. But when she died that jurisdiction ceased. At the moment of her death it became a question of property and that property could not be taxed by Tennessee for the plain and simple reason that it had no jurisdiction thereof.

Tennessee cannot enforce any ~~lien~~ on the securities that are in Alabama. As to them Tennessee cannot maintain any proceeding *in rem*. If allowed by this Court to impose a succession tax, it will operate and can only operate by way of a personal debt owing by Mrs. Scales to the State of Tennessee and the collection thereof will be by a process akin to garnishment of the property owned by her in Tennessee.

WHEN THE SITUS OF INTANGIBLES BECOMES ANALOGOUS TO THE ACTUAL SITUS OF TANGIBLE PERSONAL PROPERTY, THE LAW OPERATES ON BOTH ALIKE

"Taxation is a very practical matter." It now seems to be settled by a majority of the Supreme Court, and the decisions commented on above show that everyone on the Supreme Court at the time, except Judge Holmes, agreed to the proposition that all succession taxes, whether they be denominated a death tax, estate tax or inheritance tax, are enforceable only in and by the state that has jurisdiction of the property. Even in the old days when the maxim of *mobilia sequuntur personam* was applied in all of its vigor to all kinds of personal property, it was conceded that the property was governed by the law of the state in which the property was situated, and when the state in which the property was situated applied to the property, whether tangible or intangible, the maxim, it was incorporating by way of comity the law of the state of the domicile and enforcing the foreign law by way of comity or courtesy as its own law.

All of the modern decisions are to the effect that this ancient rule no longer applies. It is definitely established that it no longer applies to tangible property and the more recent decisions, which are well considered, show that the Supreme Court of the United States will only resort to the maxim of *mobilia sequuntur personam* when the proof fails to show

that intangibles have acquired a situs analogous to tangible personal property in a state other than the domicile.

The indenture executed in 1917 between Mrs. Scales and the Trust Company down at Birmingham, Alabama, was evidently intended by Mrs. Scales and by all parties concerned to be a location of a trust in Alabama. We do not claim anything outside of the documents executed by her as showing that intention, but no other intention can be gathered from the documents signed by her than that it was her purpose to establish a trust in Alabama, and lodge the securities into the custody and control of the Trust Company.

It is claimed, however, that she in these documents tied enough strings to the trust to prevent the transactions from operating as a location of the situs in Alabama. First attention is called to the reserved right to change the investment. It seems to us fairer to say that instead of revoking or annulling the situs in Alabama, this provision should be weighed in analogy to the law in reference to tangible property, for if the matter involved were tangible personal property no one would deny that its location would be in Alabama; yet under the common law Mrs. Scales would have had a right to swap it, sell it, or otherwise exchange it into other personal property and by so doing it would never have operated as a relocation of tangible property from Alabama back into Tennessee.

Likewise as to the question of disposing of the securities by will. If the matter involved had been tangible personal property in Alabama, Mrs. Scales would have had the right to make a will disposing of the same in any manner she saw fit. If she could do that as to tangible personal property, why not reserve to herself the right to dispose of intangibles located in Alabama? If the situs is analogous, the rights of the trustor are analogous. It so happens in this case that the trust was not revocable, but even had it been, the *Safe De-*

posit case decides that, not being exercised, such power of revocation had no effect upon the situs of the securities.

In appellee's answer, the officials of Tennessee seem to lay great stress on the reserved right to substitute another trustee. The appellant's answer (Record page 37) says:

"The power to remove the trust securities at any time into another state does not give such securities a business situs within the state of the residence of the trustee."

There is nothing that can be found in the trust instrument that in so many words gave Mrs. Scales the right to transfer the securities from Alabama back to Tennessee. Our information was, however, that it would be insisted by the officials of Tennessee that the clause permitting Mrs. Scales to substitute another trustee was tantamount to authority to remove her property back to Tennessee because she could have substituted a trustee domiciled in Tennessee and that such Tennessee trustee would have the authority to bring the securities into Tennessee. It was for that reason that the Alabama respondents amended their answer by setting up the Statute of the State of Alabama to the effect that a trust estate could not be removed from Alabama except by a process through the courts.

It is not permitted to remove trust funds out of state at common law.

65 C. J. 699, Sec. 564, notes 76 and 80;
Code of Alabama of 1923, Sections 10418-21.

The rule that title to personal property is to be determined by the laws of the domicile of the owner gives way whenever the statutes of the country where the property is situated, or the established policy of its laws, prescribe to its courts a different rule. 12 C. J. 472.

None of these reservations in the trust instruments have the effect of destroying the analogy to the situs of tangible property. All of the rights that were reserved by Mrs. Scales would have applied to any ownership of tangible property she might have had in Alabama. It is the law generally that no state will allow a trust estate to be removed from its jurisdiction except upon a proper showing that it is to the advantage of the *cestui que trust* to do so.

It is true that in the decisions of the United States Supreme Court and even in the *Safe Deposit* case there was some stress of the language of the trust about reserved rights. The United States Supreme Court in the case of *Burnet v. Brooks*, in commenting upon some former decisions of that court, used (288 U. S. at 391-2) this language:

"The reference in the statement of this conclusion, to the authority of the agent to sell, invest and reinvest was by way of emphasis and is not to be taken as importing a necessary qualification."

It was at one time contended that a revocable trust instrument was nothing more than a will. But such is not the case. *Perry on Trusts*, Section 97, 7th Edition, p. 119.

"The essential difference between such a trust instrument and a will is that the former acts at once to vest the interest in the beneficiaries, although their enjoyment is postponed until after the death of the settlor, but a will does not take effect until after the death of the testator and until that time vests no interest in the beneficiary."

CONCLUSION

It is respectfully submitted that when the situs of stocks and bonds and mortgages is fixed by legal process, whether by statute or contract between the parties, in a state other than the domicile of the owner such latter state is the only one that can impose a succession tax on such property. The theory that a succession tax is a personal tax applying to the owner can no longer stand. Such a tax only becomes effective after the death of the former owner and even the state of her domicile has no longer jurisdiction of the person that has died. It is the property that passes on to someone else that is taxed and it can only be taxed by the state in which it is located. This is the trend of modern decisions and the common sense view of "the very practical matter of taxation."

An attempt to apply the maxim *mobilia sequuntur personam* to a person no longer living would seem to be, in the language of the Supreme Court in the *Safe Deposit* case, "inexcusable and patent injustice."

Respectfully submitted,

A. A. CARMICHAEL,

Attorney General of Alabama,

CHAS. C. TRABUE, JR.,

RAY RUSHTON,

MARION RUSHTON,

WALTER KNABE,

FONTAINE HOWARD,

Attorneys for Appellants.

I hereby certify that three copies of the foregoing Brief and Argument were mailed, postage prepaid, to Edwin F. Hunt, Assistant Attorney General of Tennessee, at Nashville on the 29th day of December, 1938.

RAY RUSHTON,

Of Counsel for Appellants.